

**SUBMISSION OF COMMENTS
BY THE GOVERNMENT OF THE UNITED STATES
ON THE GOVERNMENT OF JAPAN'S GUIDELINE ESTABLISHED UNDER
THE LARGE-SCALE RETAIL STORE LOCATION LAW (*DAITEN-RICCHI HO*)**

May 20, 1999

OVERVIEW

The Government of the United States commends the Ministry of International Trade and Industry (MITI) and the Joint Council of the Distribution Subcommittee of the Industrial Structure Council and the Distribution Subcommittee of the Small and Medium-Sized Enterprise Policy Council (Joint Council) for their extensive efforts to establish a more transparent and competitive retail sector in Japan. With regard to implementation of the Large-Scale Retail Store Location Law (*Daiten-Ricchi Ho*), the United States welcomes the opportunity to submit comments on the draft "Guideline Related to Items that Should be Taken into Consideration by Persons Who Establish Large-Scale Retail Stores" (*Daikibo Kouri Tempo o Setchi Suru Mono ga Hairyo-subeki Jiko ni Kansuru Shishin*) (Guideline), as well as the Joint Council's "Establishment of Draft Guidelines in Article 4 of the Large-Scale Retail Store Location Law" (*Daikibo Kouri Tempo Ricchi Ho Dai 4 jo no Shishin (An) no Sakutei ni attate*) (Explanatory Document), issued on April 20, 1999.

The Large-Scale Retail Store Law (*Daitenho*) posed an obstacle to foreign investors and exporters, with its limitations on the establishment, expansion and business operations of large stores. By impeding the business operations of large stores, the *Daitenho* reduced productivity in merchandise retailing, raised costs, discouraged new domestic capital investment and diminished the selection and quality of goods and services. Partial liberalization of the *Daitenho* created opportunities for both Japanese and foreign retailers to establish and expand operations, resulting in more than \$1 billion in U.S. foreign direct investment in Japan's distribution and retail sectors. These investments have created jobs in Japan, expanded choices for Japanese consumers and increased bilateral trade. However, it was recognized in both Japan and abroad that further liberalization of Japan's retail sector was needed.

The United States welcomed Japan's abolition of the *Daitenho*, but has expressed, on numerous occasions, reservations with its replacement, the *Daiten-Ricchi Ho*. The United States appreciates Japan's efforts to address U.S. concerns with the *Daiten-Ricchi Ho*, in particular, Japan's undertakings relative to that Law that are set out in the "Second Joint Status Report on the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy" (Second Joint Status Report), issued by President Clinton and Prime Minister Obuchi on May 3, 1999. The United States recognizes that over the coming months Japan will be developing a number of measures to implement the *Daiten-Ricchi Ho*, and that the United States and other interested parties will have an opportunity to comment on the draft measures before they are finalized. Moreover, only when all of the measures are issued will the legal framework implementing the *Daiten-Ricchi Ho* be

complete. However, because the Guideline is the centerpiece for this system, its scope and content are particularly critical.

The United States believes that deregulation in Japan in general, and implementation of the *Daiten-Ricchi Ho* in particular, should be guided by the following fundamental principles: regulations should be designed to achieve legitimate regulatory objectives; unnecessary and costly regulations should be avoided; competitive distortions arising from necessary regulations should be minimized; and regulations should be applied in a fair and uniform manner. It is in this context that the draft Guideline, as the first and most critical measure for the implementation of the *Daiten-Ricchi Ho*, should be scrutinized and necessary adjustments made in it to ensure the establishment of a fair and transparent legal framework that will foster competition and facilitate market access in Japan's retail sector. In addition, it is essential that Japan ensure that the transition from the old *Daitenho* system to the new system implemented under the *Daiten-Ricchi Ho* will be smooth and will not impede retail investors from undertaking an orderly expansion of their business.

After close examination, the United States is very concerned that the Guideline, as drafted, could complicate or even discourage new retail store development and create a regulatory environment that is more burdensome than the current regime under the *Daitenho*. The U.S. concerns are:

- ! Fundamental principles underlying implementation of the *Daiten-Ricchi Ho* are contained in a separate Explanatory Document that has no legal status.
- ! The Guideline appears to rely on prior evaluation rather than *ex post* verification, which is contrary to the trend of deregulation in Japan.
- ! The Guideline imposes obligations on entities intending to establish large-scale retail stores (store openers) that appear to exceed current legal requirements and that do not have to be met by existing stores and other types of commercial enterprises.
- ! The Guideline uses a number of very vague terms and criteria, which will not provide store openers with the certainty and predictability that they need to undertake orderly plans for establishing and expanding stores, and may lead to disputes between store openers and local governments and local residents.
- ! The Guideline imposes overly prescriptive standards on store openers that will intrude upon their management prerogatives.

The United States submits the following comments in the interest of ensuring that the *Daiten-Ricchi Ho* is implemented in a consistent, transparent and predictable manner and that the Guideline provides store openers with a national standard for their consideration with regard to preservation of the living environment and also provides local governments with detailed criteria, as a national standard, to use in presenting opinions and making recommendations.

I. COMMENTS ON THE EXPLANATORY DOCUMENT AND TECHNICAL EXPLANATION

Explanatory Document

In the Explanatory Document that accompanied the draft Guideline, the Joint Council has set out the rationale underlying the development of the *Daiten-Ricchi Ho* regime, including the Guideline, as well as the Council's related recommendations. The United States welcomes and supports many of the principles and recommendations set out in the Explanatory Document. However, because the Explanatory Document has no legal status, it is questionable whether local governments will implement the *Daiten-Ricchi Ho* in a manner consistent with these principles and recommendations. To ensure that the *Daiten-Ricchi Ho* is implemented in the manner contemplated by the Joint Council, it is of fundamental importance that the Japanese Government incorporate into the Guideline the following statements and recommendations from the Explanatory Document:

1. Adjustments of the opening of large-scale retail stores to mitigate their potential impact on existing local small and medium-sized businesses are contrary to the intention of the *Daiten-Ricchi Ho* and are not allowed in the implementation of the Guideline. In addition, ordinances (*jorei*) and guidelines (*yoko*) that provide for commercial adjustments, similar to adjustments under the *Daitenho*, are contrary to the *Daiten-Ricchi Ho* and cannot be permitted (p. 3, Japanese document; p. 3, English document).
2. Local governments are not empowered to adopt any additional regulations (so-called "*uwanose kisei*") that increase the burden on large store openers with regard to the procedures and guidelines stipulated by the *Daiten-Ricchi Ho* (p. 3, Japanese document; p. 4, English document).
3. It is not appropriate to hold store openers responsible for problems that existed before the opening of their stores, such as traffic congestion and noise pollution (p. 4, Japanese document; p. 4, English document).
4. Full consideration should be given to streamlining procedures for store openers. For instance, the number of notification forms should be minimized so that an excessive burden will not be levied on store openers. It is also necessary to establish a category of "minor" changes that do not require a notification so that store openers will not be required to submit numerous alteration notifications (p. 5, Japanese document; p. 5, English document).
5. There should be legal and practical coordination between the *Daiten-Ricchi Ho* and existing laws that relate to the establishment of large-stores, including regulations related to traffic, noise and garbage (p. 7, Japanese document; p. 7, English document).

6. When it is not possible for a large store opener to use the numerical figures and formula provided as standards in the Guideline, the store opener may use other figures and formula as long as it is able to explain the change. For example, large store openers may use different standards based on the actual data of similar stores in the same chain (p. 7, Japanese document; pp. 7-8, English document).
7. Prefectural governments will not be allowed to impose a special burden on a store opener without a rational basis; and they should apply the *Daiten-Ricchi Ho* in a manner that ensures fairness and rationality (p. 7, Japanese document; p. 8, English document).
8. The issue of whether a particular location is appropriate for a large-scale store should be addressed through the zoning mechanism, and not through application of the Guideline (p. 4, Japanese document; p. 4, English document).
9. Since the *Daiten-Ricchi Ho* applies only to large stores and requires openers of such stores to give special consideration to various factors, the burden of large store openers should not be heavier than that of facilities not subject to the Guideline (p. 4, Japanese document; pp. 4-5, English document).
10. It is essential that there be full contact and coordination among local governmental agencies applying the *Daiten-Ricchi Ho*. In addition, relevant central government ministries and agencies are urged to take steps to facilitate contact and coordination with local governments (pp. 6-7, Japanese document; p. 7, English document).

Technical Explanation

In addition to the Explanatory Document, the Joint Council has provided a second explanatory document, entitled “Explanation of Technical Items Included in the Guideline” (*Shishin ni Fumumareru Gijitsu-teki Jiko ni Kansuru Kaisetsu* or Technical Explanation) as a reference for the technical portions of the various coefficients and calculation formula included in the Guideline. MITI should clarify the status of this Technical Explanation, in particular, whether it is merely a reference document that store openers may utilize as they deem appropriate or whether they will be, in practice, required to use it. If the Technical Explanation has any legal status, several aspects such as standards, classifications and basis should also be clarified.

II. COMMENTS ON DRAFT GUIDELINE

This section will first outline generic comments that apply to all four of the issues covered in the Guideline (noise, parking, traffic and garbage), and then will set out specific concerns with regard to noise, parking and traffic.

1. Generic Comments

- (1) **Problem -- Prior Evaluation Rather than *Ex Post* Verification:** As currently drafted, the Guideline imposes onerous and costly burdens on store openers to conduct extensive research and prepare massive documentation to “prove” in advance that they will meet the standards in the Guideline. The approach will significantly and needlessly increase the cost of the notification process. It will also provide those who oppose the entry of new competitors with an opportunity to make endless demands for more research and estimates. This approach, which effectively turns the *Daiten-Ricchi Ho* from a notification system to an approval system, is inconsistent with the Japanese Government’s stated policy of moving from prior regulation to *ex post facto* enforcement of law.

Solutions: The draft Guideline should be modified as follows:

- (i) The Guideline should allow store openers the discretion to determine the measures they will take to respond to the standards set out in the Guideline, and the discretion of how to present their plans in the notification.
- (ii) Store openers’ compliance with the Guideline should be subject to *ex post* verification, rather than prior evaluation.

(2) **Problems -- Exceeds Legal Requirements**

- (i) Based upon the *Daiten-Ricchi Ho* (Article 4) and the Second Joint Status Report, it had been anticipated that the new Guideline would set a national standard for consideration by store openers regarding the preservation of the living environment. However, after careful review, the draft Guideline raises serious concerns as to whether it is consistent with Article 4 of the *Daiten-Ricchi Ho*. The *Daiten-Ricchi Ho* only sets out procedural requirements; it does not require “openers of large-scale retail stores to . . . take necessary measures that are possible and rational” to preserve the living environment, as stated in the draft Guideline (p. 1, Japanese document; p. 1 English document).
- (ii) Some of the standards set out in the Guideline are not based on the *Daiten-Ricchi Ho*, but on other laws such as those governing noise. The draft Guideline appears to have in effect incorporated these requirements and to hold store openers accountable for meeting them, even when the original requirements in those laws appear not to have been intended to apply to large-scale stores, *e.g.*, noise provisions.
- (iii) It appears that the Guideline places unjust burdens on large store openers

to redress traffic, noise and garbage problems that have their origin in broader economic activities and that should more appropriately be spread among all existing stores and shopping centers in the area, as well as taxpayers responsible for building basic infrastructure.

Solutions:

- (i) In the first paragraph of the draft Guideline, the statement that the Law requires store openers to “take necessary measures that are possible and rational” (p. 1, Japanese document; p. 1, English document) should be deleted.
 - (ii) The Guideline should explicitly state that compliance by store openers with the Guideline is voluntary and may not be made mandatory by local governments.
 - (iii) Where the Guideline incorporates or relies on legal requirements or standards set out in separate laws or regulations, it should state explicitly that for purposes of satisfying the Guideline, store openers only need to comply with such laws and requirements, and that store openers will not be subject to greater requirements than those imposed by such other laws or regulations on other entities. Also, the Guideline should provide that a statement by a store opener of its intent to comply with the legal requirements for noise, etc. will suffice for purposes of satisfying the standards set out in the Guideline.
- (3) **Problems -- Vagueness:** While differences in local conditions must be taken into account in the plans of store openers (and the review of those plans by local governments), it is essential that the *Daiten-Ricchi Ho* be applied in a uniform manner throughout Japan. As set out in the Second Joint Status Report, one of the purposes of the Guideline is to provide detailed criteria, as a national standard, for local governments to use in implementing the *Daiten-Ricchi Ho*. However, because a number of terms and concepts in the Guideline are vague and lack sufficient precision, application of the *Daiten-Ricchi Ho* and the Guideline may vary significantly among local jurisdictions. Such disparity of application could impose significant additional costs on store openers and developers of multiple locations and significantly delay store openings, as well as create friction between store openers and local governments and residents. Vague terms and criteria in the Guideline do not serve the interests of store openers, local governments or local residents.

Solutions: The following terms and criteria should be eliminated from, or more specifically defined in, the Guideline to maximize the transparency and uniformity

of the implementation of the *Daiten-Ricchi Ho*, and minimize potential areas of dispute:

- (i) The Guideline should clearly state that the criteria or standards set out in it are to be taken into consideration by store openers, but that they are not requirements that store openers will be obligated to meet.
- (ii) The term “appropriate measures” should be defined, and the Guideline should explicitly state that it is the store opener that makes the determination as to what constitutes “appropriate measures.”
- (iii) With regard to the Guideline provision (p. 2, Japanese document; p. 2, English document) that store openers provide an “adequate explanation” to local residents in explanation meetings as stipulated by the *Daiten-Ricchi Ho*, “adequate” should be deleted and the Guideline should simply state that store openers must provide an explanation.
- (iv) The phrase “so as to enable local residents to understand the situation sufficiently” (p.2, Japanese document; p. 2, English document) should be deleted from the Guideline because of its vagueness (and because it could lead to unreasonable demands for explanations).

2. Specific Comments

In addition to the generic comments, the United States has specific comments on the provisions in the Guideline related to noise, parking and traffic.

(1) Noise Guidelines

Problems: The Guideline raises several very serious concerns with regard to measures to address noise associated with the establishment or expansion of large retail stores, including the following:

- (i) The Guideline subjects store openers to standards that are not imposed on other large facilities. It establishes an onerous and unique burden on store openers by requiring that they estimate noise levels from multiple sources, including equipment, delivery, customers’ automobiles and garbage collection prior to the establishment of a large store. The requirement to estimate noise from all of these sources *a priori* and to explain how they will remedy the noise effect of their store appears to exceed the compliance requirements under other relevant Japanese laws and regulations, and thus would place a burden on store openers that is not placed on other commercial facilities. The Noise Regulation Law, for example, relies on *ex*

post rather than *a priori* estimation of noise, which means that if an enterprise exceeds the standard in its operations, it will be expected to bring its activities into compliance. However, the draft Guideline essentially requires store openers to “prove” in advance that they will not exceed the national noise standards.

- (ii) The Guideline should not provide a pretext for local governments or inhabitants to place unduly excessive or unreasonable demands on store openers. However, the draft Guideline requires store openers to estimate noise from sources not completely within their control, such as noise emitted from customers’ cars. The draft Guideline covers a wider range of sources of noise than those stipulated in the Noise Regulation Law. Specifically, of the equipment and devices cited by the Noise Regulation Law, only “air compressors and blowers” would apply to large retailers.
- (iii) It is very important that the terms and criteria set out in the Guideline with respect to noise be readily understandable to store openers, local governments and local inhabitants. However, as noted in the Technical Explanation for the Guideline, Japan does not have a definite standard for evaluating noise generated by large stores.
- (iv) The United States understands that MITI plans to produce a “technical manual” to assist store openers to estimate noise levels for stores not yet constructed based upon its recognition of the difficulty of doing under the Guideline. The fact that MITI apparently believes it is necessary to develop such a manual raises concerns that the noise provisions in the Guideline are in fact too complicated.

Solutions: With respect to noise, the United States recommends that the following changes be made to the Guideline:

- (i) As a basic principle, the Guideline must not impose burdens on large store openers that exceed or differ from those currently applicable to existing stores and similar businesses under Japanese law. Accordingly, the Guideline should state clearly that store openers are required to comply with relevant laws and regulations relating to noise on the same basis as other commercial facilities, and that compliance with such laws and regulations will constitute compliance with relevant criteria in the *Daiten-Ricchi Ho*.
- (ii) The Guideline should strictly limit the scope of noise subject to evaluation to those sources stipulated under the Noise Regulation Law and within the control of store openers.

(2) **Parking Guidelines**

Problems: The parking standards in the draft Guideline are too indiscriminate in their potential application. If applied, they could lead to less than optimal parking conditions for both shopping centers and stores and the surrounding community. They pose the following problems:

- (i) The Guideline specifies that the number of parking spaces should be sufficient to satisfy the number of customers who would drive automobiles at the peak hour of a holiday, the busiest time of the year. This “peak hour” criterion goes far beyond current practice in Japan. By MITI’s estimates, only 40 percent to 50 percent of the current large-scale retail stores that MITI surveyed could meet the parking standards in the Guideline. Compliance with the draft Guideline may force store openers to make uneconomical decisions to build extra parking facilities, which would be unused for most of the year, rather than use shared public facilities, such as parking lots, to meet unusually high demand.
- (ii) The rigid parking standards in the draft Guideline could create substantial financial disadvantages for store openers over existing stores and shopping centers, which did not have to meet such standards. To meet the Guideline standard, store openers will have to either build excessive structured parking -- a costly alternative -- or reduce the floor space of the store.
- (iii) Several of the assumptions behind, and factors in, the draft Guideline’s parking formula result in parking standards that significantly depart from industry norms. These factors include the 16 percent “peak ratio,” the significant difference between the “auto using ratio” for “commercial” and “other” areas, a lack of further population divisions below the 400,000 level, and a lack of further floor space division below 10,000 square meters. Also, both the “peak ratio” and the “auto using ratio” in the parking formula are too high.

Solutions: To bring the parking standards more in line with market realities, and to avoid the possibility that parking norms could be abused by local commercial interests to block entry of new competitors in violation of Article 13 of the *Daiten-Ricchi Ho*, the Guideline should be modified as follows:

- (i) The parking standards should be modified to reflect the current practice of existing stores in Japan.
- (ii) In addition to “commercial” and “other” areas, new area types should be added with appropriate lower “auto using ratios” that more accurately

reflect the realities of suburban development.

- (iii) The Guideline should clarify that it is the store openers that determine whether “special conditions” exist that would allow the store opener to forego application of the parking provisions in the Guideline, and use its own formulas for determining adequate parking.
- (iv) The provision in the Guideline that store openers provide employees to guide cars at parking entrances and exits in order to ensure safety and avoid illegal parking (p. 8, Japanese document; p. 9, English document) should be deleted. Measures related to traffic safety and illegal parking are beyond the authority and control of store openers.

(3) **Traffic Guidelines**

Problems: The traffic standards in the Guideline include several provisions, such as the following, that are unreasonably and unnecessarily prescriptive and interfere with the prerogatives of management:

- (i) The provision that store openers provide employees to guide arriving automobiles into its parking facilities (p. 8, Japanese document; p. 9, English document).
- (ii) The draft Guideline sets out measures that store openers need to take to enable customers and businesses to select appropriate methods and routes to have an access to the store. These measures include providing a guide map to their parking lots and asking customers not to drive cars to their store (p. 10, Japanese document; p. 10-11, English document).

Solution: Such provisions should be removed from the Guideline. It is obviously in the interest of store openers to take measures they deem necessary to avoid traffic congestion affecting access to their store and parking lots and need the flexibility to respond to local conditions. In addition, customers decide their own modes of transportation, and it is unreasonable for store openers to be expected to propose measures such as routes customers should take. The traffic guidelines should be limited to those essential to facilitate access to a store.

CONCLUSION

A fundamental premise of the use of public comment procedures is that governments, even when they have the assistance of advisory councils and other experts, do not necessarily have all, or the best, answers. Under public comment procedures, governments have an obligation to modify

draft regulations to address in an effective manner the comments from interested parties. From its long use of public comment procedures, the United States knows well the importance and the value of responding in a positive manner to public comments.

The United States recognizes and appreciates that extensive work has been undertaken to develop the Guideline. However, if the Public Comment Procedure, which was recently adopted by the Japanese Government, is to be effective, it is essential that the Joint Council and MITI make the necessary adjustments in the Guideline to respond to the public comments. MITI's use of the Public Comment Procedure will be judged by the extent to which it demonstrates a serious consideration of the comments received and modifies the final Guideline to address the deficiencies and other problems identified in the comments. In conclusion, the United States strongly recommends that MITI make the changes identified above in the Guideline before it is finalized.